

Conversely, respondent requests the Board to affirm the ALJ's 40.125 percent work disability award. Respondent argues claimant failed to prove that he made a good faith effort to find employment and the ALJ was correct in imputing the \$320 post-injury average weekly wage to claimant in computing claimant's work disability.

The issue before the Board for review is whether claimant made a good faith effort to obtain appropriate employment after he met maximum medical improvement and, if he did not, then what is his post-injury wage earning ability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

Claimant injured his low back on January 31, 1999, while working for respondent. As a result of that injury, on June 4, 1999, claimant underwent arthroscopic microdiscectomy at L5-S1 performed by orthopedic surgeon William O. Reed, Jr., M.D. Because claimant continued to experience pain in his low back and pain radiating into his lower extremities, claimant was referred to another orthopedic surgeon Jeffery T. MacMillan, M.D., for evaluation and treatment recommendations. On December 1, 1999, Dr. MacMillan performed an interbody fusion at L5-S1 with left posterior iliac bone graft. After that surgery, claimant's lower extremity pain improved, but he still remained symptomatic in his low back area. Although claimant continued to be symptomatic, Dr. MacMillan found claimant had met maximum medical improvement on June 6, 2000. The doctor released claimant with restrictions of no repetitive or extended periods of bending, stooping, and limited lifting or carrying to no greater than 40 pounds.

At his attorney's request, claimant was examined and evaluated by orthopedic surgeon Edward J. Prostic, M.D., on August 18, 2000. Dr. Prostic found claimant with severe hamstring spasm and restricted range of motion of the lower back. He limited claimant's return to work to light/medium work category with frequent change in positions and avoidance of repetitious bending or twisting at the waist, forceful pushing or pulling, or use of vibrating equipment.

Respondent was not able to accommodate claimant's permanent work restrictions and, therefore, did not return claimant to work. Claimant started looking for employment on March 29, 2000, even before claimant was released by Dr. MacMillan on June 6, 2000. He was continuing his efforts to find employment when he last testified at the March 13, 2001, regular hearing. Despite his efforts claimant failed to find other employment. Claimant not only made an effort to find employment on his own, but also registered with the State of Missouri Vocational and Rehabilitation Department and was tested in an effort to qualify for a training program in computer graphics. But claimant was unable to enter the training program because he could not afford a computer and the software needed for the program.

At the regular hearing, claimant offered and the ALJ admitted into evidence claimant's Exhibit 2 which was a notebook that contained information starting with March 29, 2000, and ending with the week of February 12, 2001, which documented claimant's efforts to find employment. During this almost 11 month period, the notebook indicated claimant failed to contact prospective employers in eight weeks of that period. But there were some weeks when claimant made as many as six to seven applications for employment. Moreover, claimant explained that some of the weeks where he did not contact prospective employers he simply was in too much pain or he was waiting for employers he had contacted in the previous weeks to contact him.

The wage loss component of the work disability test is determined by “. . . the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.”¹ But if the worker fails to make a good faith effort to find appropriate employment, the injured worker's post-injury wage is to be based upon evidence of the worker's ability rather than actual wages.²

Here, the ALJ found claimant made some effort to find other employment, but nevertheless imputed to claimant a \$320 post-injury average weekly wage because of what the ALJ described as a high demand labor market based on the low unemployment rates for the State of Kansas. The Board, however, disagrees with this conclusion and finds that claimant's testimony and the documentation included in his Exhibit 2 admitted into the regular hearing record proves that claimant made a good faith effort to find appropriate employment. But claimant was not successful in finding employment in a large part because of his work restrictions due to his injury. Thus, the Board concludes the wage loss component of claimant's work disability test should be 100 percent instead of the 24 percent as found by the ALJ. Averaging claimant's 56.25 percent work task loss with his 100 percent wage loss results in claimant's entitlement to a 78 percent permanent partial general disability based on a work disability for the January 31, 1999, work accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Robert H. Foerschler's May 31, 2001, Award should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, James E. Gillespie, and against the respondent, Sharadan Transportation, and its insurance company, Auto Owners Insurance Company, for an accidental injury which occurred January 31, 1999, and based upon an average weekly wage of \$420.

¹ See K.S.A. 44-510e(a).

² See Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Claimant is entitled to 65 weeks of temporary total disability compensation at the rate of \$280 per week or \$18,200, followed by 284.7 weeks of permanent partial disability compensation at the rate of \$280 per week or \$79,716, for a 78 percent permanent partial general disability making a total award of \$97,916.

As of June 28, 2002, there is due and owing claimant 65 weeks of temporary total disability compensation at the rate of \$280 per week or \$18,200, and 112.71 weeks of permanent partial disability compensation at the rate of \$280 per week or \$31,558. 80, for a total of \$49,758.80, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$48,157.20 is to be paid for 171.99 weeks at the rate of \$280 per week, until fully paid or further order of the Director.

The Board approves and adopts all remaining orders as set forth in the Award.

IT IS SO ORDERED.

Dated this ____ day of June 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Michael T. Halloran, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Workers Compensation Director